STATE OF MICHIGAN

COURT OF APPEALS

MT. CLEMENS DODGE, INC., and TIBOR GYARMATI, Plaintiffs-Appellants, v CHARTER TOWNSHIP OF CLINTON, Defendant-Appellee.	UNPUBLISHED August 2, 2005 No. 260623 Macomb Circuit Court LC No. 2002-005482-CZ

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right a grant of summary disposition in favor of defendant. We affirm. This opinion is being decided without oral argument pursuant to MCR 7.214(E).

This case involves plaintiffs' attempt to seek equitable, injunctive, and declaratory relief concerning the application of defendant's sign ordinances to their real property, an automobile dealership. In 2001, plaintiffs were cited for violating § 1488 of the then-existing ordinance. This section read in pertinent part that "streamers, wind blown devices, spinners, pennants, and balloons are prohibited." Plaintiffs were also cited in 2002 for violating the ordinance. Although defendant contacted plaintiffs to afford them an opportunity to remove the "streamers, banners and flags" named in the violation, plaintiffs did not do so. Subsequently, an Ordinance Complaint was issued on August 27, 2002. The complaint read, "All streamers, banners and flags must be removed from outside display." Eventually, after the instant lawsuit was filed, Mt. Clemens Dodge entered into a plea agreement concerning the ordinance violation.

Subsequently, plaintiffs filed the instant suit alleging that the ordinance: 1) violates substantive due process by being unreasonable, 2) violates substantive due process by being unconstitutionally void for vagueness, 3) violates equal protection and is selectively enforced, and 4) constitutes an illegal taking.[1] The trial court granted defendant's motion for summary

[1] During the pending litigation, the township's sign ordinance was amended. The exact extent of the changes is not evident from the record; however, the pertinent language remained in subsection 505 of the amended ordinance.

disposition, finding that: the ordinance did not constitute an unreasonable restriction on plaintiffs' property and was not a taking of the property without just compensation; the ordinance did not violate plaintiffs' equal protection rights, and plaintiffs could not show that the ordinance was selectively enforced; and the ordinance was not void for vagueness because it provided fair notice of the conduct regulated and did not give the township officer unlimited discretion in determining whether the it had been violated.

Plaintiffs argue that the trial court erred in granting summary disposition to defendant because the ordinance at issue does not apply to any signage items that they had displayed at the property. They also argue that the ordinance is unconstitutionally vague. We disagree.

In *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 341-343; 675 NW2d 271 (2003), we provided a summary of the principles used when determining whether an ordinance is void for vagueness:

> All statutes and ordinances are given a strong presumption of constitutionality. *Taylor Commons v Taylor*, 249 Mich App 619, 625; 644 NW2d 773 (2002). Accordingly, "'courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent.'" *Wysocki v Felt*, 248 Mich App 346, 355; 639 NW2d 572 (2001), quoting *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997). As this Court held in *Wysocki*, *supra* at 356, "'the court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract.'" *Id*., quoting *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940). These same rules govern the review of the constitutionality of an ordinance, *Plymouth Twp v Hancock*, 236 Mich App 197, 199; 600 NW2d 380 (1999), and it is the burden of the party challenging the validity of the ordinance (here plaintiffs) to establish that the ordinance is clearly unconstitutional. *Gora v Ferndale*, 456 Mich 704, 711-712; 576 NW2d 141 (1998).
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> In *Dep't of State v Michigan Education Ass'n--NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), this Court set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:
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> > "A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." [*Id*., quoting *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001).]
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> This Court also pointed out that in determining "whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings." *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997); see also *In re Forfeiture of 791 North Main*, 175 Mich App 107, 111; 437 NW2d 332 (1989). In line with this principle, it is

> critical for courts to remember that, when considering whether an ordinance is void for vagueness, we do "not set aside common sense, nor is the [township board] required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise." *Dep't of State*, *supra* at 120.

Plaintiffs explicitly state that they are not challenging defendant's sign ordinance as overbroad or impinging on their First Amendment freedoms. However, they argue that the ordinance is unconstitutionally vague because it does not provide fair notice as to the conduct prohibited, and it gives the trier of fact unstructured and unlimited discretion in determining whether it has been violated.

We note that plaintiffs' arguments, to the extent they seek to challenge the validity of their prior district court plea, are impermissible as an improper collateral attack of that earlier judgment. The decision of a court having jurisdiction is final when not appealed, and cannot be collaterally attacked. *SS Aircraft v Piper Aircraft*, 159 Mich App 389, 393; 406 NW2d 304 (1987). This rule applies to both orders and judgments. *Id.*; *Stewart v Michigan Bell Telephone Co*, 39 Mich App 360, 369; 197 NW2d 465 (1972). Therefore, to the extent that plaintiffs' arguments constitute a challenge to the validity of the previous citation, they cannot be sustained. Plaintiffs' first argument, then, is largely irrelevant. The fact that plaintiffs may have been issued a citation for violating the ordinance when they did not have any "streamers," "banners," or "flags" on the property is an argument that should have been made in a direct appeal from the ordinance citation, not in this appeal.

Plaintiffs' argument that the ordinance is void for vagueness because it does not provide fair notice of the conduct it regulates, is without merit. As noted by the trial court, the ordinance regulates signage in great detail. The chart in § 400 of the ordinance specifically lists the various types of signs a business may have in each type of district. Section 300 of the ordinance provides a number of specific definitions that correspond to the types listed in § 400. Subsection 303 defines a "business" sign as "[a]n accessory sign related to the business, activity, or service conducted on the premises upon which the sign is placed." A business sign may be a lawn sign, a pylon sign, or a wall sign, each of which is described in the ordinance. See Subsection 303(a). "Sign" is defined in Subsection 312 as "[t]he display of words, numerals, figures, devices, designs or trademarks to make known an individual, firm, profession, business, product or message and which is visible to the general public." Subsections 303(b) and 303(c) set forth the signage permitted in each business zone. Special event signs, and the process for obtaining them, are also delineated in the ordinance. See Subsection 313. The general restrictions, including the provision in dispute here, are set forth in Section 500.

As a whole, the regulations are clearly worded and comprehensive. We agree with the trial court's conclusion that the lack of included specific definitions for "streamers, wind blown devices, spinners, pennants, and balloons" prohibited by Subsection 501 is of no moment. These terms are familiar to the average person. Cf. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002) (involving a challenge to a prohibition against the use of "indecent, immoral, obscene, vulgar or insulting" language). Familiar terms need not be defined in the ordinance. *Shepherd Montessori Ctr Milan*, *supra.* In addition, plaintiffs' argument that the "streamers," "banners," or "flags" for which they were initially cited do not fall under this definition is unpersuasive. Streamers, banners, and flags are clearly wind blown devices. They are specifically designed to attract attention to plaintiffs' business by color and wind movement.

And as the trial court noted, it matters little that the forms of these devices are subtly different or whether the ordinance officer called them by their proper name in the initial citation. Under the ordinance, plaintiffs are not permitted to have any of them on site, but must instead be content with the standard business signage allowed under the remaining provisions of the ordinance. Plaintiffs' real arguments appear to be that the prohibition is too broad, and that they should be permitted to have additional signage to attract attention. However, this frustration does not form a basis for finding that the ordinance does not provide fair notice of what is prohibited.

Plaintiffs' next argument is that the ordinance is unconstitutionally vague because it gives the trier of fact unstructured and unlimited discretion in determining whether it has been violated. We disagree. Plaintiffs maintain that the testimony of the ordinance enforcement officer that it is within his discretion to issue a violation notice demonstrates that the ordinance is unconstitutionally vague because it provides the enforcement officer with unlimited discretion. This is not what is meant by improper unlimited discretion. See e.g., *Belle Maer Harbor v Charter Twp of Harrison*, 170 F3d 553, 558-560 (CA 6, 1999) (finding unconstitutional an ordinance involving the definition of whether a boat bubbling system allowed a "reasonable radius" of open water). Here, the language of the ordinance itself is straightforward, and is along the lines of a strict liability statute. The challenged terms describe distinct objects, not concepts subject to open-ended interpretation. The fact that an enforcement officer might not choose to issue citations in every instance where the ordinance is violated does not render the ordinance facially vague. The ordinance itself does not encourage arbitrary and discriminatory enforcement. *Boomer*, *supra* at 539-540.

Lastly, defendant invites us to award sanctions for what they deem plaintiffs' vexatious appeal. We decline the invitation. Although we disagree with plaintiffs' positions, we are not convinced that they are taken in bad faith.

Affirmed.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly